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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/766,841	01/30/2004	Dimitri Papadimitriou	Q79004	4575

23373 7590 08/19/2009
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EXAMINER

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ART UNIT	PAPER NUMBER
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2445

MAIL DATE	DELIVERY MODE
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08/19/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/766,841
Filing Date: January 30, 2004
Appellant(s): PAPADIMITRIOU ET AL.

Diallo Crenshaw
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 7/1/2009 appealing from the Office action mailed 9/19/2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-10 are rejected under 35 U.S.C. 102(e) as being anticipated by McCanne (US 6,611,872).

In regard to claim 1, McCanne disclosed *a method for establishing a connection via a first serving edge node of a serving network, (use of end routers and overlay routers on the edge of a network, column 8, lines 50-64) said method comprising: receiving one or more diversity parameters defining one or more diversities between said connection and a further connection via a second serving edge node of said serving network, (exchange of connection parameters, column 11, line 51 - column 12, line 4) wherein said first serving edge node and said second serving edge node are different serving edge nodes (column 11, lines 53-56), and exchanging information between said serving edge nodes and of, in response to exchanged information, setting up at least a part of said connection. (column 11, line 51 – column 12, line 4)*

In regard to claim 2, McCanne disclosed *said first serving edge node is coupled via a first client edge node to a client source node in a client network, and said second serving edge node is coupled via a second client edge node to said client source node in said client network, said first client edge node and said second client edge node being different client edge nodes situated in said client network. Figure 4A.*

In regard to claim 3, McCanne disclosed *said exchanged information comprises a request flowing from said first serving edge node to said second serving edge node, at*

least a part of each connection being defined by one or more connection parameters.

(Column 11, line 51 - column 12, line 4)

In regard to claim 4, McCanne disclosed said exchanged information comprises one or more further connection parameters defining at least a part of said further connection and flowing from said second serving edge node to said first serving edge node, said first serving edge node calculating at least a part of said connection.

(column 11, line 51 - column 12, line 4; column 12, lines 19-35)

In regard to claim 5, McCanne disclosed said exchanged information comprises one or more connection parameters defining at least a part of said connection and flowing from said first serving edge node to said second serving edge node, said second serving edge node calculating at least a part of said connection. (column 11, line 51 - column 12, line 4; column 12, lines 19-35)

In regard to claim 6, McCanne disclosed a connection parameter comprises at least one of a connection identification, a connection node, a connection link, a connection resource, a connection source and a connection destination, and wherein a diversity parameter comprises at least one of a link diversity, a node diversity, a resource diversity, a shared risk diversity, a link non-diversity, a node non-diversity, a resource non-diversity and a shared risk non-diversity. (column 11, line 66 - column 12, line 4)

In regard to claims 7-10, McCanne disclosed a serving edge node and interface for use in a serving edge node and a client edge node and interface for use in a client edge node for performing a method for establishing a connection via a first serving edge

node of a serving network, (use of end routers and overlay routers on the edge of a network, column 8, lines 50-64) which method comprises a step of receiving one or more diversity parameters defining one or more diversities between said connection and a further connection via a second serving edge node of said serving network, (exchange of connection parameters, column 11, line 51 - column 12, line 4) wherein said first serving edge node and said second serving edge node are different serving edge nodes, (column 11, lines 53-56) and exchanging information between said serving edge nodes and of, in response to exchanged information, setting up at least a part of said connection, (column 11, line 51 – column 12, line 4) said serving edge node comprising a request-transceiver for transceiving a request to/from another serving edge node; a connection-parameter-transceiver for transceiving connection parameters to/from another serving edge node; a calculator for calculating at least a part of said connection. (column 11, line 51 - column 12, line 4; column 12, lines 19-35)

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to

be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1 and 7-10 are provisionally rejected on the ground of nonstatutory double patenting over claims 1 and 7-8 of copending Application No. 11166212. This is a provisional double patenting rejection since the conflicting claims have not yet been patented.

The subject matter claimed in the instant application is fully disclosed in the referenced copending application and would be covered by any patent granted on that copending application since the referenced copending application and the instant application are claiming common subject matter, as follows: The claims of the instant application are directed toward a *method (claim 1) for establishing a connection via a first serving edge node of a serving network, which method comprises a step of receiving one or more diversity parameters defining one or more diversities between said connection and a further connection via a second serving edge node of said serving network, characterised in that said first serving edge node and said second serving edge node are different serving edge nodes which method comprises the steps of exchanging information between said serving edge nodes and of, in response to exchanged information, setting up at least a part of said connection.* The co-pending application is toward a *network (claim 1) for setting up a connection from a first node to a second node through transmitting a request message from the first node to the second node and transmitting an allocation message (diversity parameter) from the second node to the first node, characterised in that the request message comprises an*

indication for indicating the first node's capabilities with respect to a first signaling procedure (exchanging information and diversity parameters) and with respect to a second signaling procedure, the allocation message comprising an instruction for instructing the first node to use one of the signaling procedures for the setting up of the connection. The co-pending application is to establishing a connection between nodes, whereas the instant application is toward establishing a connection between edge nodes.

Furthermore, there is no apparent reason why applicant would be prevented from presenting claims corresponding to those of the instant application in the other copending application. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804

(10) Response to Argument

Appellant argued McCanne does not disclose *receiving one or more diversity parameters defining one or more diversities between said connection and a further connection via a second serving edge node of said serving network, wherein said first serving edge node and said second serving edge node are different serving edge nodes*. McCanne exchanged connection parameters in order to initiate a connection between a sender and an overlay router. The sender and the overlay router inherently have different IP addresses or different MAC addresses. McCanne taught the use of TCP. TCP required a handshake including information identifying the points in the handshake. This information exchanged in a handshake must include the IP or MAC address. The IP or MAC address of the sender and the overlay router must be different in order to communicate with each other. The addresses are different, and the addresses are exchanged. The addresses are not only connection parameters defining the two end points of the connection, but are further more *diversity parameters defining one or more diversities between said connection and a further connection via a second serving edge node of said serving network* because the addresses are different, *diverse* numbers. Appellant has not provided any explanation or definition, either extrinsically or intrinsically, to allow a different interpretation of the term *diversity parameters*.

Appellant did not argue the impropriety of the double patenting rejection. Appellant has effectively waived any arguments concerning the double patenting rejection. Therefore, the provisional double patenting rejection should be affirmed.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Jeffrey R. Swearingen/

Examiner, Art Unit 2445

Conferees:

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